

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.44 OF 1990**

Lakhu Balku Patil, since deceased )  
by his heirs :- )  
)  
A. Kondabai w/o. Lakhu Patil, )  
Age 46. )  
B. Manohar Lakhu Patil, )  
Age 16 Minor. )  
C. Balasaheb Lakhu Patil, age 20, )  
No.B is minor through C.A. L. )  
Appellant No.A, Kondabai Lakhu )  
Patil. )  
All of Mirad, Taluka Jath )  
District : Sangli. )....Appellants  
(Orig.Plaintiffs)

V/s.

Smt.Saraswatibai Tukaram Saude, )  
age 55, Agri.Mirwadi, Taluka Jath, )  
District : Sangli. )....Respondent  
(Orig.Defendant)

**ALONGWITH**

**SECOND APPEAL NO.45 OF 1990**

Rakhamaji Maruti Patil, since )  
deceased by his heirs :- )  
)  
1-A. Krishna Rakhamaji Patil, )  
Aged 47 years, r/o.Mirwadi, )  
Taluka Jath, Dist.Sangli, )  
)  
1-B Sakharam Rakhamaji Patil, )  
aged 42 years, r/o. Mirwad, )  
Taluka Jath, Dist.Sangli, )  
)  
1-C Sou. Gangubai Amirita Misal, )  
aged 51 yrs. R/o. Pratapur, )  
Taluka Jath, Dist. Sangli. )  
)  
1-D Sobabai Shobhabai Krishna Gadage, )  
Age 37 yrs, r/o. Pacchapur, )  
Taluka Jath, Dist.Sangli. )  
)  
1-E Bhagubai Rakhamaji Patil, )  
aged 72 yrs. r/o. Mirwad, )  
Taluka Jath, Dist.Sangli. )....Appellants  
(Orig.Plaintiffs)

V/s.

Smt.Saraswatibai Tukaram Saude, )

age 57, Occ. Agri. of Mirwad,  
Taluka Jath, Dist. Sangli.

)  
)....Respondent  
(Orig.Defendant)

Mrs.Anita A. Agarwal for Appellants.  
Mr.M.D. Angal for Respondent.

**CORAM : A.S. AGUIAR, J.**  
**DATED : AUGUST 9, 2005.**

**ORAL JUDGMENT :-**

. The above two appeals are admitted on the additional substantial questions of law framed with the permission of the Court which are as follows :-

1. Whether the lower Appellate Court was justified in holding that the plaintiff's abandoned their claim for specific performance solely on the basis of a statement in the cross examination which is contrary to the actual state of affairs?
2. Whether the lower Appellate Court justified in assuming that the Advocate for the plaintiff's has argued that the transaction was one of mortgage and therefore the Plaintiff was entitled to redemption, when such plea was obviously an alternative plea to the main prayer for specific performance ?
3. Whether the lower appellate Court was justified in dismissing the plaintiff's suit without deciding the real controversy between the

parties ?

4. Whether a suit for specific performance of an agreement of reconveyance is liable to be dismissed only on the ground that the plaintiff has taken alternative pleas by describing the transaction as one of mortgage ?

. Second Appeal No.44/90 arises from the order of the Additional District Judge, Sangli, in Regular Civil Appeal Nos.73/82 from Judgment and Decree in R.C.S.No.11/76 and Second Appeal No.45/90 is from the Judgment and Order of Additional District Judge, Sangli, in Regular Civil Appeal No.59/82 from Judgment and Decree dated 30th January, 1982 in R.C.S.No.10/76.

2. The plaintiffs in both the R.C.S.Nos.10/76 and 11/76 are cousin brothers. Suit No.10/76 is in respect of Survey No.102/3 while Suit No.11/76 is in respect of Survey No.102/4. Survey No.102/3 admeasures 90 R and is assessed at 56 paise. Survey No.102/4 admeasures 78 R and is assessed at 37 paise. Both the plots which are Bagayat lands i.e. productive land growing sugarcane etc., are situate at Merwad Village, Jath Taluka, Sangli. It is the case of the plaintiffs that they are agriculturists and owners of the said lands. They state

that they had on 23rd February, 1971 entered into a transaction of Mudatkhareedi (conditional sale) with the respondent, original defendant herein, in respect of the suit lands for Rs.3000/- and Rs.2000/-, respectively. The original plaintiffs executed registered sale deeds in respect of the respective lands and in favour of the defendant Saraswatibai who in turn executed an agreement to resell and hand over possession of the said lands to the plaintiffs on their repaying the amount of Rs.3000/- and Rs.2000/-, respectively, to the defendant-purchaser within five years from the date of agreement.

3. Sometime in the month of December, 1975, the plaintiffs requested the defendant to accept the sale price of Rs.3000/- and Rs.2000/- received by them and to handover possession of the suit lands and execute reconveyance in favour of the plaintiffs. Plaintiffs agreed to bear the costs and expenses including the costs of travel that would be incurred by the defendant. However, the defendant evaded the plaintiffs' request. Hence, the plaintiffs issued notice dated 31st December, 1975 to the defendant informing the defendant that they were ready and willing to return the amounts of Rs.3000/- and Rs.2000/-, respectively, which amounts would be paid to the defendant in the presence of the Sub-Registrar and requested the defendant to attend the

office of the Sub-Registrar to execute the deed of reconveyance. The plaintiffs also sent some money to the defendant to defray the expenses for travelling to the office of the Sub-Registrar. An Appointment for execution of the reconveyance was fixed for 9th January 1976. Notice was duly served on the defendant on 1st January 1976. However, on the appointed date i.e. on 9th January 1976, though the plaintiffs attended the office of the Sub-Registrar from 10.30 a.m. to 5.30 p.m., the defendant failed to turn up and sign the said document. Subsequently on 10th January 1976, plaintiffs received a reply from the defendant's Advocate dated 5th January 1976, denying the existence of the agreement and alleging that the same was a fabricated document and not executed by the defendant. Defendant further stated that she had made some improvement in the plot like improvement of well, plumbing etc. Plaintiffs claim that they are ready and willing to perform their part of the contract and to return the amount of Rs.3000/- and Rs.2000/-, respectively, taken by them. The plaintiffs say that the defendant is denying the said document with a view to swallow up property of the plaintiffs and hence, the plaintiffs have filed present suit for specific performance and for order and decree directing the defendant to accept the payment of Rs.3000/- and Rs.2000/-, respectively, and to execute the Reconveyance

in favour of the plaintiffs.

4. The defendant has filed her written statements (Exhibits 21 and 22 respectively) in two suits denying the contentions of the plaintiffs and alleging that the suit lands were sold to her. She has denied that the transaction were of Mudatkhareidi. Defendant has denied that she has signed any agreement to reconvey the property. Defendant has further alleged that after execution of the sale deed, she has developed the property and made improvements to the well and has spent considerable amount for development of the suit property. She further claim that she has constructed a house on the said land for which she had incurred expenses of Rs.3000/-. On the basis of the pleadings as aforesaid, the trial Court framed the following issues common to both the suits :-

- 1) Does plaintiff prove that suit land is sold to the deft. on the conditional sale ?
- 2) Does plaintiff further prove that deft. executed separate agreement to resale suit land in his favour ?
- 3) Does plaintiff prove that defendant made breach

of agreement to resale suit land ?

- 4) Is plaintiff entitled to specific performance and possession of suit land as claimed ?
- 5) Is plaintiff entitled to mesne profits from defendant ?
- 6) What order or decree ?

5. Evidence was recorded in both the suits separately. In support of their case, plaintiffs have examined themselves as well as other witnesses who have witnessed the execution of Exhibit-44 by the defendant to resell the properties to the plaintiffs viz. one Dhondiram Dadu Sanade (PW-4), Sarpanch of village Merwad as well as Jaganath Atmaram Mane (PW-3). The defendant has also examined two witnesses viz. Mohd. Mujawar (DW-2) who deposed at Exhibit 74 in RCS No.10 of 1976 and one Dadu Tukaram Waghmare (DW-33) and Maruti Vithoba Misal (DW-4). On the basis of the evidence recorded of the aforesaid witnesses, the trial court by a detailed order answered all the issues in the affirmative and decreed the plaintiffs' suit for specific performance. Although the evidence was recorded separately in both the suits, the trial court on the application of the

plaintiffs directed that the evidence be held common to both the suits.

6. From the said order of the trial court, defendant filed appeals being Appeal Nos.73/82 and 59/82. The Appellate Court framed two points for consideration viz.

1. Whether the transaction is of mortgage by conditional sale ?
2. Whether the plaintiff is entitled to get the property resold to him with delivery of possession ?

. After hearing learned Advocates for the parties, the Appellate Court answered both the issues in the negative.

7. Mr.Angal, learned Advocate for the defendant points out that Appellate Court has rightly decided the points in the negative. It is pointed out that learned Advocate for the respondents had before the Appellate Court made a submission that the transaction in dispute was an English Mortgage falling under Section 58(e) of the Transfer of Property Act but since there were no

words incorporating the condition for resale to the transferor in Exhibit-44, learned Advocate for the respondent had to concede that the transaction does not fall under Section 58(a) of the TP Act. It is pointed out that when the transaction of mortgage is by conditional sale, the condition of resale is required to be incorporated in the deed of mortgage. It is pointed out that learned Advocate for the respondent was required to make a statement before the Appellate Court that the plaintiffs' case was that the transaction in dispute was an English Mortgage in view of the evidence of the plaintiff-Lakhu Balku Patil in RCS Suit No.10-76 wherein he had stated "I have filed the suit because transaction is of mortgage by conditional sale and pray for redemption". But in view of the fact that there was no such condition contained the agreement Exhibit 61 in Suit No.11/76 and Exhibit 73 in Suit No.10/76 for resale, it could not be a document of mortgage by conditional sale. The said document is in respect of a transaction which is nothing but an out-and-out sale.

8. It is the contention of the learned Advocate for the respondent herein that the plaintiffs had given up their case for specific performance by alleging that the transaction in question is a mortgage by conditional sale. Since in both the cases, it was necessary that

condition for repurchase should have been incorporated in the document of mortgage, both the documents (Exhibit 61 and Exhibit 73) cannot be construed either as documents of mortgage by conditional sale or as documents of English mortgage and that since the transaction is not proved to be a mortgage but amounts to an out-and-out sale, the question of the defendant executing the agreement to reconvey, i.e. Exhibit 44 did not arise. It is pointed out that Appellate Court has come to the conclusion that the claim for specific performance has been abandoned by the plaintiff in view of the statement made in para 5 of his evidence wherein the plaintiff has stated "I have filed the suit because the transaction is of mortgage by conditional sale and pray for redemption". The Appellate Court held that since the plaintiff is pressing his claim based on mortgage by conditional sale, the claim cannot be sustained as there is no document as required under Section 58(e).

9. Admittedly the documents (Exhibits 73 and 61) in the two suits purporting to be transactions of mortgage by conditional sale do not incorporate any condition for repurchase. The plaintiff claim for reconveyance of the property only on the basis of the said documents by themselves is not sustainable. The claim that the

transaction is a mortgage by conditional sale is made by the plaintiffs on the basis of the agreement (Exhibit 44) allegedly executed by the defendant-mortgagee in favour of the plaintiffs-mortgagors. The Defendant has denied the execution of Exhibit-44. However, the plaintiffs have led evidence to prove the execution of the agreement dated 23rd February, 1971, Exhibit-44, for sale of the property by the defendant to the plaintiffs.

10. The transaction entered into by the plaintiffs and his cousin brothers Lakhu Balku Patil with the defendant was a transaction of Mudatkhareedi i.e. conditional sale. Plaintiffs and his cousin brother had executed the registered sale deed in respect of the loans and the defendant in turn has simultaneously executed the agreement of resale and agreed to handover possession of the respective lands on the repayment to the defendant of Rs.3000/- and Rs.2000/- by the plaintiff and his cousin brothers, respectively. The option to repurchase was to be exercised within the period of five years and accordingly, sometime in the middle of December 1975, the plaintiffs requested the defendant to accept Rs.3000/- and Rs.2000/- respectively and to execute for reconveyance in favour of the plaintiffs and hand over possession of the suit lands and to comply with other conditions of the agreement for

resale. Since the defendant kept evading, the plaintiffs by their Advocates' notice dated 31st December, 1975 informed the defendant that the amount would be returned to her on 9th January, 1976 in the office of the Sub-Registrar and she was required to execute the document of resale on the appointed day. The said notice was duly served upon the defendant on 1st January, 1976. The plaintiffs had also forwarded to the defendant the travelling expenses for attending the office of the Sub-Registrar. However, the defendant failed to attend the office of the Sub-Registrar on 9th January, 1976 despite the plaintiffs waiting in the said office for the whole day. Subsequently, the defendant sent her reply through Advocate denying the existence of the agreement of re-sale claiming that it is a fabricated document. The plaintiffs were therefore compelled to file the suits. Plaintiffs has led the evidence of PW-3 (Exhibit-4) who was the witness to the execution of the agreement of sale dated 23rd February 1971 in the office of the Sub-Registrar at Jath. The said witness PW-3 has on oath stated that the defendant put her thumb impression on the said agreement dated 23rd February, 1971 in the presence of the two other witnesses viz. one Lingappa Babu Kamble and Pandurang Balaji Huddar and the said witnesses have also signed the document.

11. The Plaintiffs have also examined PW-4 Dhondiram Dadu Saude, Sarpanch of village Mirwad. The said Sarpanch has deposed that the plaintiff Lakhu Patil had filed a complaint on 21.4.75 and 25.4.75 complaining that the defendant was constructing house in the suit land without permission of the Gram Panchayat and the Gram Panchayat had issued a notice to the said defendant to stop the work, however, the said defendant failed to stop work and carried on the construction.

12. From the above, it is seen that there is prima facie evidence to accept the plaintiffs' contention that possession of the lands was handed over to the defendant as security for the loans taken by the plaintiffs from the defendant with a specific condition for repurchase of the property on plaintiffs repaying the loan amounts to the defendant. The factum of defendant having executed the document for resale of the property in favour of the plaintiffs has been proved by the plaintiff's witness (PW-3) Baburao Mane whose evidence has gone uncontroverted and there is no reason to reject his evidence.

13. The execution of the document for resale by the defendant in favour of the plaintiffs having been

established, the plaintiffs' case for specific performance of the agreement ought to have been considered by the Appellate Court. The learned Appellate Court instead accepted the defendant's contention that the plaintiffs had abandoned the claim for specific performance of the agreement in view of a statement made by the plaintiff in his cross-examination that the transaction in dispute is an English Mortgage falling under Section 58e of the Transfer of Property Act. It appears that on the basis of the said statement made by the plaintiff in his evidence, learned Advocate for the respondents original plaintiffs, submitted that the transaction in dispute is an English Mortgage under Section 58e of the Transfer of Property Act and in view of the said submission, the Appellate Court held that since there were no words incorporating the condition to resell the said property in the said document to the transferor i.e. the plaintiffs, the learned Advocate for the respondents had to concede that the transaction does not fall under Section 58c of the Transfer of Property Act. The Appellate Court further held that a new case has been set out in appeal by the plaintiffs through the learned Advocate without any pleadings to that effect in the plaint and that it was difficult for the Court to reconcile the two transactions, viz. one being admittedly an out-and-out sale as evidenced by

documents of sale Exhibit 73 and Exhibit 61, and Exhibit-44 allegedly executed by the defendant on the very same day i.e. 23rd February, 1971, the execution of which the defendant has denied. The Appellate Court further held that the claim in the suit for specific performance of the agreement dated 23.2.1971 has been abandoned by the plaintiffs as the son of the deceased plaintiff has in evidence stated that the suit is based on the mortgage by conditional sale and since there was no document as required under Section 58c of the TP Act, the claim of mortgage by conditional sale was not sustainable. After recording this finding, the Appellate Court allowed the appeal of the purchaser and set aside the decree of the lower court and dismissed the plaintiffs' suit for specific performance.

14. The substantial question of law, therefore, raised in this second appeal is "whether the lower appellate Court was justified in holding that the plaintiffs had abandoned their claim for specific performance solely on the basis of a statement of the plaintiffs' witness in cross-examination which is contrary to the actual state of affairs. It must right away be pointed out that the Appellate Court could not have on the mere statement of the plaintiff that the transaction was in the nature of mortgage by conditional

sale, jumped to the conclusion that the plaintiffs had abandoned their case of specific performance of the agreement dated 23rd February, 1971 for resale, executed by the defendant in favour of the plaintiffs (Exhibit-44) despite the fact that the plaintiff had led evidence before the trial court proving the execution of the agreement for resale by the defendant to the plaintiffs. The Appellate court has given no finding as to whether the plaintiffs on the basis of the averments in the plaint and on the basis of the evidence led, would be entitled to specific performance of the agreement. The statement of the plaintiff that the transaction in question was a mortgage by conditional sale, could have been considered as an alternative plea but the same could not have been used by the Appellate Court for non suiting the plaintiffs in the suit for specific performance when the plaintiff has adduced sufficient evidence to prove the execution of the agreement for resale (Exhibit-44). Even if the alternative plea had been rejected by the Appellate Court as the same did not fulfil the condition of Section 58c, in the sense there was no condition incorporated in the original document of sale for reconveyance of the property by the mortgagee-defendant in favour of the plaintiffs, the same could not be a ground for the lower Appellate Court to have rejected

the plaintiffs' suit for specific performance of the agreement. No reasons have been set out by lower Appellate Court for rejecting the plaintiffs' suit for specific performance other than setting up of an alternative plea by the plaintiffs which the Appellate Court held to be not sustainable. It was incumbent upon the Appellate Court before dismissing the plaintiffs' suit for specific performance, to have given its findings on whether the plaintiffs had made out a case for specific performance specially in view of the evidence that has come on record proving the existence of the agreement (Exhibit-44).

15. Clearly the lower Court has committed an error in recording the finding that the claim for specific performance was abandoned by the plaintiffs, without giving a finding as to whether the plaintiffs are entitled to the specific performance of the agreement, specially in view of the evidence that has come on record. In the circumstances, we set aside the order of the Appellate Court. The matter is remanded back to the lower appellate Court with a direction to record a finding whether the plaintiffs are entitled to specific performance of the agreement (Exhibit 44).

16. All points urged by the respondent-original

defendant including the question whether the plaintiffs have abandoned their claim for specific performance, are kept open. Learned Appellate Court to consider the relevant documents and evidence on record and give a finding on merits. The District Judge, Sangli to complete the hearing within the period of three months after receipt of the record.

17. With the above order, appeals to stand disposed of with no order as to costs.

18. Office is directed to forward the papers and proceedings at the earliest to the District Court.

. Certified copy expedited.

**(A.S. Aguiar, J.)**